BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers	CC Docket No. 02-33
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	CC Dockets Nos. 95-20, 98-10

REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

The People of the State of California and the California Public Utilities Commission ("California") respectfully submit these reply comments in response to the Notice of Proposed Rulemaking ("NPRM"), released February 15, 2002, by the Federal Communications Commission ("FCC") in the above-captioned proceedings.

California reiterates its position that the maintenance of existing unbundling and interconnection requirements under Title II governing an incumbent local exchange carrier's ("LEC") provision of broadband transmission services is critical if the 1996 Act's principal goal of enhancing consumer choice of services at lower prices through competition is ever to be realized. Nothing has significantly changed since the adoption of federal unbundling and interconnection requirements to warrant their removal. In California, SBC, and other incumbent LECs, continue to be the sole providers of broadband transmission service to nearly half of all residential customers in the state who have access to broadband service. No other viable broadband alternatives are available to these customers. As a matter of law and sound public policy, SBC, as the owner and operator of essential bottleneck broadband transmission facilities, must remain subject to the interconnection, unbundling, and tariffing mandates of section 251 of the 1996 Act, and the FCC's Computer Inquiry requirements. Until this essential bottleneck is broken, the FCC should not, and indeed cannot, lift the unbundling and interconnection requirements of Title II.

California will not repeat the reasons for its position here. In these reply comments, California responds to comments, made by SBC and Verizon, that urge the FCC to generally preempt state regulation of

broadband transmission service provided over wireline facilities. California respectfully submits that preemption is not proper under applicable law.

As a matter of law, preemption cannot be sustained. As voice migrates to broadband technology using wireline facilities, there is no question that much of this traffic will be intrastate and local. In California, over 75 percent of voice traffic is intrastate. To the extent that voice traffic originates and terminates in a given state, the regulation of such traffic is subject to the exclusive authority of the states. 47 U.S. C.
§ 152(b). This is so, regardless of the underlying technology used to transmit the voice traffic.

In Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986), the Supreme Court held that Congress "fence[d] off from FCC reach or regulation intrastate matters." The court further rejected the argument that FCC preemption is barred only "when the matter to be regulated is purely local, and when interstate communication is not affected by the state regulation which the FCC seeks to pre-empt." Id. at 374. Such an argument, the court held, "misrepresents the statutory scheme and the basis and test for pre-emption." Id. Congress understood that most, if not all, communications facilities are interchangeably used for interstate and intrastate services in a single, integrated network, id. at 373, but chose to tolerate the jurisdictional tensions that would necessarily arise from that fact. Id. at 375.

The "*only* limit that that the Supreme Court has recognized on a state's authority over intrastate … service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." California v. FCC, 905 F.2d 1217, 1243 (emphasis in orig.). This is the so-called impossibility exception noted in footnote 4 of Louisiana. 476 U.S. at 375, n.4.

Relying on Louisiana, the court in California v. FCC vacated the FCC's Computer III order because it impermissibly encroached on state authority over intrastate enhanced services in violation of section 152(b). The court also made clear that the impossibility exception is narrow and limited, and vacated the FCC's preemption of state structural and nonstructural regulations governing the provision of intrastate services as insufficiently narrowly tailored so as to fall within this exception. 905 F.2d at 1243-45.

In this case, state authority over intrastate or local voice calls using broadband technology over wireline facilities does not negate the exercise of the FCC's authority over interstate traffic using such technology. The FCC has never attempted to preempt the state's jurisdiction to ensure that residential and other customers continue to receive intrastate and local voice service on just and reasonable terms and conditions. The FCC should not do so here simply because broadband technology is used in lieu of narrowband technology to place such calls.

Nor, with respect to ISP-bound traffic, would the assertion of state authority to set service quality standards and ensure reasonable terms and conditions of service, such as billing and termination practices, negate the exercise of federal authority over such traffic. For example, the FCC has properly not sought to interfere with state regulation that requires adequate prior notice to customers before their ISP-bound service is terminated. In circumstances such as these, the application of the so-called impossibility exception is simply not justified.[1]

Like the FCC, California seeks to promote the deployment of competing broadband technologies so that California customers may realize the benefit of greater choice of services at lower prices promised by the 1996 Act. Indeed, in section 706, reproduced at the note to 47 U.S.C. § 157, Congress expressly preserved the dual regulatory scheme by directing *both* the FCC and the states to further the deployment of advanced telecommunications services, which, the FCC has found, includes DSL service subject to common carrier regulation under Title II. Association of Communications Enterprises v. FCC, 253, F.3d. 29, 31 (D.C. Cir. 2001); Worldcom, Inc. v. FCC, 246 F.3d 690, 694 (D.C. Cir. 2001); AT&T Corp. v. City of Portland, 216 F.3d 871, 879 (9th Cir. 2000). Congress further specified in section 706 that *both* the states

[1] In California v. FCC, 39 F.3d 919 (9th Cir. 1994), the court upheld federal preemption of the particular state structural and nonstructural safeguards at issue there because the FCC had sustained its burden of

and the FCC should exercise their "regulatory jurisdiction" to promote advanced telecommunications services. Thus, contrary to SBC's claim, Congress expressly carved out a role for the states to play in furthering advanced services, such as DSL service, and did not intend for the FCC to preempt state regulation in the name of implementing a uniform regulatory scheme.

At the same time, California seeks to ensure that its customers enjoy all of the basic consumer protections that Congress intended to maintain under the Act when providers of information services own or control the essential high-speed transmission facilities upon which these services are provided. In California, SBC and other incumbents provide the sole means of broadband transmission service to 45 percent of California's customers who live in locales with access to broadband service. There are no viable, competing broadband transmission service alternatives for these customers. Thus, for 45 percent of California's residents, SBC controls all of the broadband transmission facilities necessary for these residential customers to connect to the Internet. In these circumstances, nothing in the Act indicates congressional intent to oust the states from adopting basic consumer protections for these captive customers.

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showing that it was practicably infeasible for the differing federal and state safeguards to co-exist.

In sum, notwithstanding SBC's and Verizon's contrary assertions, state regulation is fully compatible not only with the goals of encouraging broadband deployment and promoting intermodal competition, but also with ensuring basic consumer protections. Preemption of state regulation is flatly inconsistent with congressional intent and contrary to sound public policy.

Respectfully submitted,

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